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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

No. 747

ROBERT V. McRAE,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California,
and
BRIEF IN SUPPORT THEREOF.

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No.

ROBERT V. McRAE, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable, the Supreme Court of the United States:

The petition of Robert V. McRae respectfully shows:

I.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

(1) That the following is a summary of this cause:

That petitioner is a citizen of the United States and of the State of California; that on the 5th day of

December, 1946, petitioner was accused by the District Attorney of the County of Sacramento, State of California, by an information filed in and with the Superior Court of the State of California, in and for the County of Sacramento, of the crime of violation of Section 288a of the Penal Code of California (sex perversion), pursuant to an order of commitment, therefor given and made in the Municipal Court of the City of Sacramento, County of Sacramento, State of California, following a preliminary examination upon a complaint charging said crime;

That thereafter, on motion of petitioner, on the 3rd day of January, 1947, the said Superior Court gave and made its order dismissing the said information and discharging petitioner, upon the ground that no sufficient cause for the commitment of petitioner was shown in the preliminary examination in the said Municipal Court;

That thereafter, the People of the State of California appealed from said order of said Superior Court in said cause, to the District Court of Appeal of the State of California, in and for the Third Appellate District; that thereafter said District Court of Appeal, by its decision and judgment filed on the 13th day of June, 1947, affirmed the said order of said Superior Court;

That thereafter, after hearing therein on motion of said appellant, the Supreme Court of the State of California, by its decision and judgment filed on the 17th day of December, 1947, reversed the order of said Superior Court.

(2) That the following is a statement of the matter involved on this application:

The matter here involved is the legal propriety of the commitment of petitioner by the Municipal Court of the City of Sacramento, County of Sacramento, State of California, on December 3, 1946, as to whether or not it was made to appear on the part of the prosecution, at the preliminary examination, that a public offense had been committed, and that there was sufficient cause to believe petitioner guilty thereof, within the meaning of Section 872, Penal Code of California, so as to justify the issuance of said commitment by the magistrate, and as to whether or not the commitment of petitioner was upon reasonable and probable cause, within the meaning of Section 995 of the Penal Code of California.

The evidence in the cause, summarized, shows that upon preliminary hearing, one Laurel Quigley, testified that on a named date, and at a specified time and place, the petitioner committed upon the person of the witness the act of sex perversion denounced by Section 288a of the Penal Code of California; that at said time the witness was of the age of 15 years; that the witness made no resistance or protest to the commission of the act upon him. No other evidence of any kind, either as to the commission of any act by petitioner, or as to the mentality of the prosecuting witness, was produced. The petitioner did not testify.

The question involved is whether or not a commitment for felony, upon reasonable and probable cause, can be founded on the uncorroborated testimony of an accomplice.

II.

STATEMENT CONCERNING JURISDICTION.

That the jurisdiction of this Court is invoked under the provisions of Section 1 of Amendment XIV, Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law; and Section 237, Judicial Code (28 U.S.C.A. 344).

That the validity of the following State constitutional provisions and statutes is involved:

Section 13, Article I, Constitution of California, providing, in part, that no person shall be deprived of life, liberty, or property without due process of law.

Section 8, Article I, Constitution of California, providing in part, that offenses formerly required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate.

Section 872, Penal Code of California, providing as follows: If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the complaint an order, signed by him, to the following effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to be-

lieve the within-named A. B. guilty thereof, I order that he be held to answer to the same."

Section 995, Penal Code of California, providing as follows: The indictment or information must be set aside by the Court in which the defendant is arraigned, upon his motion, in either the following cases: (Subsec. 2.) That the defendant had been committed without reasonable or probable cause.

Section 1111, Penal Code of California, providing as follows: A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

It is contended that the questions involved are substantial, being of first impression in this Court and in the Supreme Court of California, and concerning, as is submitted, the right of citizens of the State of California, and residents of the United States of America in general, to due process of law at all stages of criminal proceedings in which they or any of them may be accused of crime; that the decision and judgment of this Court is required to obtain and maintain uniformity in the law, as respects important public questions, the decision of the Court whose judgment is

sought to be reviewed not being consonant with established rules of decision in the State of California, and in other States of the Union.

That the federal questions sought to be reviewed were raised in the various Courts heretofore considering this cause as follows:

(A) In the Superior Court of the State of California, in and for the County of Sacramento, by oral motion and argument thereon, a motion to dismiss the information being by the Court granted without opinion;

(B) In the District Court of Appeal of the State of California, in and for the Third Appellate District, by reply to assignment of error set forth in petitioner's brief therein, and by oral argument; that the District Court of Appeal determined said questions in petitioner's favor, as evidenced by the opinion of that Court, hereto annexed and marked "Exhibit 1";

(C) In the Supreme Court of California, by reply to assignment of error in petitioner's brief filed in the District Court of Appeal, transmitted to the Supreme Court of California upon order granting a hearing therein and by oral argument, that the said Supreme Court determined said questions adversely to petitioner, as evidenced by the opinion of that Court, hereto annexed and marked "Exhibit 2";

(D) In the Supreme Court of California, by petition for rehearing therein, and assignment of error set forth in the said petition and memorandum of

points and authorities in support thereof; that said Supreme Court determined said questions adversely to petitioner, by order denying a rehearing, without opinion.

III.

THE QUESTIONS PRESENTED.

The question presented on this application is whether or not the requirements of due process of law within the provisions of the 14th Amendment to the Constitution of the United States are met by the commitment of an accused for felony after preliminary examination at which the only evidence received consisted of the uncorroborated testimony of an accomplice, where the Constitution of California provides that a commitment may be had only after examination, and the Statutes of California provide that such commitment may issue only where it is made to appear, upon examination, that a crime has been committed and that sufficient cause exists to believe that the accused is guilty thereof, and further provide that no conviction may be had upon the uncorroborated testimony of an accomplice.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(A) That the decision of the Supreme Court of California, authorizing the commitment of petitioner, upon uncorroborated testimony of an accomplice, and holding that such testimony may constitute a showing of sufficient cause for such commitment, constitutes a deprivation of petitioner's right to due process of law, in that, pursuant thereto, he may be deprived of his liberty upon testimony which, under the constitution, statutes, and established rules of decision in California and elsewhere in the Union, cannot constitute proof sufficient to cause any fact to appear in a judicial proceeding, and amounts to an authorization for the imprisonment of petitioners, and all other citizens accused of crime in California, without evidence to sustain a commitment.

(B) That the review of the decision by this Court is necessary to the determination of questions of great public import, concerning the liberty of every person, to insure that the right to such liberty be not infringed by any judicial criminal proceeding, ostensibly valid but actually void for want of evidence.

(C) That the questions here presented have not been decided by this Court, nor by the Supreme Court of California, and are therefore of first impression herein and therein, and that the decision of this Court is required to furnish a rule of decision general and uniform in its application.

Wherefore petitioner prays that a Writ of Certiorari out of and under the seal of this Court be issued herein, to review the judgment of the Supreme Court of California in said cause.

Dated, Sacramento, California,
April 3, 1948.

DONALD EUGENE WACHHORST,
Counsel for Petitioner.

PETER MANNINO,
C. K. CURTRIGHT,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of counsel for the petitioner in the above-entitled cause, and that, in my judgment, the foregoing petition is well founded and not interposed for delay.

Dated, Sacramento, California,
April 3, 1948.

DONALD EUGENE WACHHORST,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No.

ROBERT V. McRAE, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE APPELLATE COURTS OF CALIFORNIA.

The Order of the Superior Court of the State of California, in and for the County of Sacramento, dismissing the information in this case and discharging the petitioner from custody, was made and entered on January 3, 1947, without opinion. (People of the State of California v. Robert V. McRae, No. 16654, Dept. 1.)

The judgment of the District Court of Appeal of the State of California, in and for the Third Appellate District, affirming the order of said Superior Court, was filed June 18, 1947. (80 A.C.A. 515.)

The judgment of the Supreme Court of California, reversing the order of said Superior Court, was filed December 17, 1947. (187 Pac. (2d) 741.)

The order of the Supreme Court of California, denying a rehearing, without opinion, was filed January 15, 1948.

II.

STATEMENT OF THE CASE.

Both the history of the cause, and the facts pertinent to the determination of the questions involved, have been stated in the petition for certiorari to which this brief is annexed; they will not, therefore, be repeated herein, in the interests of brevity.

III.

INTRODUCTION.

In approaching the presentation of the points of petitioner upon this application, counsel desire to respectfully request the Court's attention to the following considerations:

First, this cause is one of first impression. We have carefully examined the reports of this Court and the various States, in an endeavor to ascertain what rules

should be applied to the situation as disclosed by the record. In so researching the cause, we have observed that this Court has never decided the questions here involved, as applied to the factual situation in question, and that resort must be had to a consideration of general principles, aided by a consideration of decisions of the States.

Second, the decision of the Supreme Court of California, sought to be reviewed, is by a divided Court, the Chief Justice and four of the associate justices concurring in the majority opinion while two of the justices dissented.

IV.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 237, Judicial Code, upon the following grounds:

(1) The Court whose judgment is sought to be reviewed is the Court of last resort of the State of California;

(2) The judgment sought to be reviewed is final, the opinion having been filed more than thirty days prior to the filing of the annexed petition. (Rule 24a, Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, July 1, 1943.) A remittitur has been issued. (Rule 25a, Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, July 1, 1943.)

(3) A substantial federal question is involved, to-wit, as to whether or not the requirements of due process of law, within the provisions of the 14th Amendment to the Constitution are met by the commitment of the petitioner for felony after preliminary hearing at which the only evidence received was the uncorroborated testimony of an accomplice, the statutes of California providing that no conviction shall be had upon the uncorroborated testimony of an accomplice (Section 1111, Penal Code of California); this question, as we have pointed out above, is apparently of first impression in the Court therefore no authorities as to the appropriateness of the exercise of this Court's jurisdiction in the particular case can be supplied.

(4) The question was material, the federal question having been directly decided by the District Court of Appeal of the State of California (Opinion, Exhibit 1), and being necessarily involved in the decision of the Supreme Court of California, the question having been directly raised by petitioner's briefs. (Opinion, Exhibit 2.)

It is therefore submitted that the review prayed is within the jurisdiction of this Court.

Chesebro v. Los Angeles County Flood Control Dist., 59 S. Ct. 622, 306 U. S. 459.

V.

THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA AUTHORIZES THE IMPRISONMENT OF PETITIONER WITHOUT DUE PROCESS OF LAW.

The basic contention of petitioner here is stated in the decision of the District Court of Appeal of California in its opinion as follows:

"To indict or commit an accused person without legal evidence would result in depriving the defendant of his liberty without due process of law contrary to the inhibition of the Fourteenth Amendment to the United States Constitution." (Opinion, Exhibit 1.)

The proposition thus stated resolves itself into the following question presented by the record here: Is the uncorroborated testimony of an accomplice legal evidence, capable of causing it to "appear" that a public offense has been committed, and that there is sufficient cause to believe the accused guilty thereof so as to justify his commitment (Section 872, Penal Code of California), in the light of the requirement that no conviction shall be had upon the uncorroborated testimony of an accomplice. (Section 1111, Penal Code of California.)

---

(1)

SECTION 1111, PENAL CODE OF CALIFORNIA, APPLIES TO PRELIMINARY HEARINGS.

Section 1111, Penal Code of California as has been pointed out in the decision of the Supreme Court of California, provides that a "conviction" may not be

had upon the uncorroborated testimony of an accomplice. Is this provision the equivalent, as argued in the opinion of a provision that such evidence is unworthy of belief only upon a *trial, after* indictment or information found? We think not, and submit that the decision so holding is erroneous.

What is comprehended by the term, "Conviction"? In popular and general acceptation, this word means the action of court or jury finding an accused guilty of the crime charged, but the work has also the more limited (or, possibly, more extensive) connotation, that a "conviction" includes not only the verdict or finding, but *also* the *accusation* and the trial.

People v. Black, 122 Cal. 73, 54 Pac. 385;

State v. Willette, 46 Mont. 326, 127 Pac. 1013.

It includes also the essential finding of *probable cause* for a commitment:

> " 'Conviction' is an adjudication that the accused is guilty. It imports all that the statute requires *before* holding one to bail, and more. It involves not only the corpus delicti, *and the probable guilt* of the Accused, but his actual guilt." (Emphasis ours.)
>
> *Nason v. Staples,* 48 Me. 123.

It follows that if preliminary examination and valid commitment are elements of a valid conviction, and the Constitution of this State so provides (Article I, Section 8), the requirements of the statute as to the proof necessary to establish the whole, apply equally to each of the parts. Section 1111 of the Penal Code does not provide that a conviction may be had *in part*

upon the uncorroborated testimony of an accomplice, and *in part* only if that testimony is corroborated. In other words, if, as is obvious, Section 1111 applies to *convictions,* it applies to every element comprehended by the term—examination, information, trial, and verdict. We submit that a finding of sufficient cause for a commitment is as much an essential to a conviction as is a jury trial, and that Section 1111, Penal Code, provides a criterion for the consideration of the testimony of accomplices applicable equally to both trials and preliminary examinations.

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(2)

THE WITNESS IS AN ACCOMPLICE.

It is held by the Courts of California considering this question that the witness testifying at the preliminary hearing was an accomplice. (Opinions, Exhibits 1 and 2.)

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(3)

THE TESTIMONY OF AN ACCOMPLICE IS NOT SUFFICIENT TO ESTABLISH "REASONABLE AND PROBABLE CAUSE" FOR THE COMMITMENT OF THE ACCUSED.

The question presented by this application is whether or not the testimony of an accomplice, standing alone, without corroboration of any kind is sufficient to establish reasonable and probable cause for the commitment of a defendant and the filing of an information against him charging him with felony.

This case presents, so far as we are able to determine, the first instance in which this question was presented to the Appellate Courts of the State of California. As stated above, the question resolves into one of whether or not the respondent is being deprived of his liberty without due process of law. That a lawful and valid commitment and a lawful and valid information filed thereon after preliminary examination by a magistrate, constitutes due process of law cannot be gainsaid. "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment, by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." *Constitution of California,* Article I, Section 8. It follows from this constitutional provision that the provisions of law as to preliminary examinations must be followed in order to constitute due process of law, and as elsewhere provided in the Constitution of the State, its provisions are mandatory. (*Constitution of California,* Article I, Section 22.) Likewise it is the duty of the committing magistrate upon hearing the proofs at the preliminary hearing to discharge the accused if sufficient cause to believe the defendant guilty of a public offense is not shown (*Penal Code,* Section 871) and the only authority possessed by the magistrate to order the commitment of the accused depends upon its appearing from the examination that a public offense has been committed "and there is sufficient cause to believe the defendant guilty thereof." (*Penal Code,* Section 872.)

It follows that one test of a valid commitment is whether or not there is "sufficient cause" to believe the defendant guilty of the crime charged. The term "sufficient cause" has often been construed to mean due and probable cause, and the terms are interchangeably used. The question in the instant case therefore resolves itself into the express inquiry as to whether or not a showing of probable cause in a felony prosecution may be made by the uncorroborated testimony of an accomplice, and whether or not a commitment based upon such evidence and an information filed in pursuance thereof are valid and lawful, and constitute due process.

In the first place, the "sufficient cause" defined in Sections 871 and 872 of the Penal Code is that which induces a belief in the *guilt* of the defendant. It follows that the measure of that guilt in the view of the magistrate can not be and upon principle, ought not be, different from that sufficient to induce a similar belief in the minds of a jury. By express provisions of the law of California, the uncorroborated testimony of an accomplice is declared to be wholly insufficient to sustain a verdict of guilt.

> "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (Section 1111, Penal Code.)

The provisions of Section 1111, Penal Code, are *mandatory* upon the Courts of this State.

People v. Hobson, 7 Cal. App. (2d) 392, 46 Pac. (2d) 279.

"The Court has no discretion in the matter, but is bound to apply the statute indiscriminately to *all* cases *wherever* an accomplice appears as a witness, and the State's case depends solely upon his uncorroborated testimony". (Emphasis ours.)

People v. Robbins, supra;

People v. Kempley, 205 Cal. 441, 271 Pac. 578.

The requirement that an accomplice be corroborated is held to be in *addition* to the doctrine of reasonable doubt:

"* * * it in effect says that even though the jury are convinced to moral certainty that the defendant is guilty, yet they must acquit him if the testimony of the accomplice is not corroborated by other evidence which connects or tends to connect him with the offense charged."

People v. Dillon, 68 Cal. App. 457, 229 Pac. 974.

And the Appellate Court of California said, in *People v. Sciaroni,* 4 Cal. App. 698, 89 Pac. 133:

"But the legislature, acting within the scope of its authority, has provided that to justify the conviction of a defendant there must be substantial corroboration of the testimony of an accomplice. This rule of evidence is doubtless based upon sound public policy. But, whether so or not, it cannot be ignored without an unwarranted invasion of the constitutional rights of the citizen."

The presumption of innocence attends the accused during all stages of the proceeding—it exists in his favor whether or not he is accused, before and after he is accused, upon his arrest, at the preliminary hearing, after commitment, and throughout the trial until the verdict of the jury determines his guilt.

People v. Arlington, 131 Cal. 231, 63 Pac. 347.

The presumption is certainly not suspended during the preliminary examination—it operates then with as great force as upon a trial. If the presumption of innocence will support a verdict of acquittal in a criminal case (*Everett v. Standard etc. Ins. Co.,* 45 Cal. App. 332, 187 Pac. 996), being *evidence* in defendant's favor, how can that presumption be overcome by testimony at a preliminary hearing, which testimony the law expressly declares to be insufficient to overcome that presumption upon a trial? If the rule that accomplice testimony must be corroborated is in *addition* to the doctrine of reasonable doubt (*People v. Dillon,* supra), and the moral certainty of the jury of defendant's guilt may not overcome that doubt where the certainty is based upon accomplice testimony, what certainty or "sufficient cause to believe the defendant guilty of a public offense" can arise upon such testimony before the magistrate? We submit that the uncorroborated testimony of an accomplice is, upon principle, as much under disability in the preliminary proceedings as it is upon the trial.

We submit that upon no consideration can it be reasonably said that the *guilt* of a defendant may be said to be made to appear even upon preliminary

examination by evidence, which by express and specific provision of the statute of California is insufficient to establish that guilt. It requires no metaphysical research into the law of probabilities to arrive at the conclusion that that which can not prove the existence of a fact can not give rise to a probability of its existence.

What the Court is dealing with in this case are not niceties of legal reasoning, nor the infinite speculation as to final results which may be expected from a known premise. It is dealing with the cold and inescapable fact that a citizen whose liberty is guaranteed to him as an inalienable right under the Constitution of the State, and of the United States is being deprived of his liberty, not by due process of law, but by arbitrary determination based upon a mere speculation. In other words, this defendant is being detained of his liberty upon the mere statement by his partner in crime that a crime was committed and that the defendant committed it. The mere statement of such a proposition is a sufficient answer to any contention that such procedure constitutes the administration of justice. Apart from the moral and logical considerations involved here, the precise question now presented to this Court has heretofore received the attention of the Court of last resort of the State of Alabama in the case of *State v. Smith,* 138 Ala. 111, 35 So. 42, 100 Am. St. Rep. 26. The Supreme Court of that State, speaking by McClellan, C. J., said:

"* * * The above conclusion leaves but one question in the case. That is whether the uncorroborated testimony of an accomplice may be sufficient to show probable cause to believe that a felony has been committed and that the party under inquiry is guilty thereof. An accomplice was a competent witness at common law, when in the discretion of the court or prosecuting officer he was admitted as a witness; but his testimony was regarded as issuing from a polluted source, and it was the recognized practice of the courts to charge juries that it should be received with caution and closely and doubtingly examined, and to advise them that a conviction should not be had upon it unless it was corroborated in some material particular to the connection of the defendant with the act charged: 1 Am. & Eng. Ency. of Law, 393, 397-400.

Many years ago the foregoing principles of the common law were accentuated and crystallized into a statute in this state which positively forbade a conviction in any case, felony or misdemeanor, on the uncorroborated testimony of an accomplice. By an act of 1863 it was provided that said statute should 'not extend to trials on indictments for misdemeanor,' and thereafter the original statute took on the form it now has as embodied in Section 5300 of the code, viz.:

'A conviction of felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission or the circumstances thereof, is not sufficient.' It is to be noted that this statute in

terms operates only to prevent convictions of felony on the testimony of an accomplice. It does not in terms apply to preliminary examinations nor to trials on habeas corpus nor to the exclusion of a finding of probable cause for believing that an offense has been committed and that the accused is guilty thereof, on such examination or trial. Yet, in our opinion, its effect is to stamp a policy upon the administration of the law in this connection which cannot be carried out unless it be given operation upon cases where the inquiry is probable cause vel non, as well as where the inquiry is as to absolute guilt. The statute infects the testimony of accomplices with such absolute infirmity as that not only may the citizen be not convicted upon it, but as also that he should not be deprived of his liberty in anticipation of a final trial upon it. A consideration of practicabilities in the administration of the criminal law, so to speak, would seem to enforce the same conclusion. Why should the citizen be held to the grand jury, or indicted by the grand jury on testimony upon which no petit jury could possibly convict him? What good end could be served by such a proceeding? Can there be said to be even probable cause shown in any case by testimony which the law expressly and positively declares to be insufficient to support a conviction? We think not. The whole theory of holding accused persons to the grand jury is that the evidence before the examining magistrate or the judge on habeas corpus is sufficient to sustain a finding of guilt by a petit jury when he shall be indicted and brought to the bar of the court. When there is no such evidence, it is not the con-

templation of the law that the accused shall be held. To hold him would be a vain and useless thing, involving his incarceration not as a punishment for crime and not really to the end that he should be tried for a crime charged, of his probable guilt of which there is evidence to prove, but at the best upon a mere speculation that evidence may be found to corroborate that of the accomplice. The evidence before the probate judge in this case tending to show the guilt of the petitioner was that of the accomplice alone, and uncorroborated. The judge correctly discharged the petitioner, and his order to that effect is affirmed."

Again, this question was presented to the Supreme Court of the State of Nevada, in the case of *Ex parte Oxley,* 38 Nev. 379, 149 Pac. 992. That Court, in an opinion by Norcross, C. J., said following a lengthy quotation from *State v. Smith,* supra:

"We are inclined to doubt the wisdom of viewing the testimony of an accomplice with the same strictness when considered in reference to a preliminary examination as upon a trial, we are quite sure that a comparison of the testimony given by the witness Madden upon the second preliminary examination with that given by him upon the examination would remove any such doubt. His conflicting and utterly irreconcilable statements in reference to material matters affords a concrete illustration of the fact that the rule had its origin in necessity.

"Petitioners having been committed to the custody of the sheriff of Elko County on a charge of

grand larceny *without reasonable or probable cause,* it is ordered that they be discharged forthwith from custody upon such commitment." (Emphasis ours.)

Ex parte Oxley, supra.

It seems to us that the considerations and the reasoning which impelled the Courts of Alabama and Nevada to the conclusion reached in the two cases just quoted are unanswerable, except by resort to arguments wholly incompatible with the requirements of due process and the preservation to the defendant of his constitutional rights.

Certainly, there is nothing in the reported opinion in *In re Schwitalla,* 36 Cal. App. 511, which affords any answer to the reasoning employed by the Courts in the *Smith* and *Oxley* cases. Careful study of the former case reveals only that the Court states without assigning reasons for the statement, that the uncorroborated testimony of an accomplice is sufficient to establish a "probability" of guilt sufficient to justify a commitment, upon the analogy of a confession being sufficient for the purpose. We submit that the analogy is not exact—in the first place, a confession is the statement of the accused and, if legally obtained and voluntary, constitutes at least a partial abandonment on his part of any protestations of innocence, while accomplice testimony is a thing for which the defendant does not vouch in any degree, and which, by reason of its polluted source and recognized unreliability is expressly declared by

statute to be insufficient to establish guilt; again, a confession is something which the accused is not obliged to give, and which if he is compelled by any means to give, is not available against him—accomplice testimony, on the other hand, is something which defendant cannot control either as to its production or its truth, and against which he is without effective safeguard other than the statutory provision rendering it unworthy of belief unless corroborated. Confession the defendant may forego, but accomplice testimony, motivated by whatever notions of revenge, malice, self-preservation or profit may actuate the witness, he can neither anticipate, meet, nor in cases of this sort, effectually deny. It follows that the sufficiency of a confession as basis for a commitment is not a valid justification for so treating the uncorroborated testimony of an accomplice.

Also, the suggestion has been made, and we anticipate that it will be argued further, that the rule for which petitioner contends—that the testimony of an accomplice upon preliminary hearing must be corroborated in order to show sufficient cause for a commitment—would in some measure and in some manner hinder or hamper the prosecution of persons charged with crime. It has not been shown how such a result could ensue, but we take it that the implication is that unless the facts in the possession of the prosecution are in some manner concealed from the knowledge of the defendant, he will take such advantage of his forewarning as to place the prosecution at some disadvantage upon the trial. As we

understand the constitutional requirements of due process, confrontation of witnesses, and information to defendant of the nature of the charge against him, it is contemplated that the accused shall at least not be taken by surprise. It seems to us that the ends of justice will be better served by a rigid observation, by all concerned, of the constitutional guaranties, than by any relaxation, however slight, of any of them. We cannot believe that the State, possessed of overwhelming resources of means, men, and money for the detection and punishment of crime, will be put to any disadvantage by the defendant, who is often penniless, friendless, and imprisoned, being informed in advance of the character and extent of the evidence against him. Thus, if the prosecution has evidence to corroborate that of an accomplice, what harm can be done the *People's* case, assuming it to be based in truth, by the production of the corroborating evidence? If the prosecution has not such corroboration available to it, what harm can be done the ends of justice, or the rights of both People and defendant, by the requirement that defendant be not committed and informed against, until such proof can be had?

Of course, so long as any crime is still in the state of detection, no one would contend that the moves of the State ought to be other than as secret as the ingenuity and dangerousness of its opponents might require for their apprehension. But when the stage of accusation has been reached—when the accused has been apprehended and the facts of his alleged crime

are known to the prosecution—then the need for stealth and concealment is past, and the accused is entitled to the benefit of every constitutional guarantee designed to insure his life and liberty against unlawful interference.

The statutory requirement of a prompt hearing before a magistrate (Penal Code, Section 859), is the first bulwark of the citizen against unjustified assaults upon his liberty, as important to that liberty as the right to habeas corpus and jury trial. We submit that the protection of this safeguard ought to be studiously accorded him, and that it ought to be neither by-passed nor stultified by anything less than a complete showing of sufficient cause to justify his commitment and detention. It has been our observation that too generally and too often the preliminary hearing, far from serving its purpose of screening from the grist flowing into our Superior Courts those cases in which the guilt of the accused does not sufficiently appear, has become a perfunctory matter of form, done as mere duty imposed by statute, and languidly tolerated by both prosecution and defense as a customary but not particularly necessary evil—a slight obstacle to be passed by on the road to trial.

Nor have the Appellate Courts of this State done as much as they might have done to maintain in the preliminary hearing the dignity to which it is entitled as a protection to the liberty of the citizen. For example, the phrase "sufficient cause" has been held to mean, in various cases and various times, mere

"probability" or "strong suspicion". As a result, too many magistrates, as well as far too many prosecutors and defense counsel, have come to treat as "sufficient cause" on preliminary hearing any evidence which lends color to a presumption of guilt, rather than to insist upon the production of evidence at least sufficiently persuasive to equal if not overcome the presumption of innocence. Perhaps this tendency is good—it perhaps does strengthen the arm of the forces of law and order—but we doubt it seriously. Any retreat from the gains of the age-long fight against the caprices of tryanny, any return to the methods of the Court of star chamber and council of Ten, is a loss to the liberties of the citizen—only too lately and too violently threatened from without to allow us to willingly submit to that loss by sloth and complacency within. Commitment upon suspicion however strong, smacks much too strongly of the practices of totalitarianism—a menace which every sinew of our civilization is being stretched to the uttermost to combat, even as this brief is being written—we submit that where no harm to the administration of justice can possibly result, it is the duty of Courts and of the prosecution and of counsel to insure that every safeguard of individual liberty be maintained at strength, lest that for which we contend without collapse from within.

VI.

CONCLUSION.

A great deal could doubtless be written, with varying degrees of force and eloquence, upon the various points set out hereinabove. We suspect, however, that little could be truly added by a further extension of this brief. We therefore desire to summarize and conclude.

The testimony of the accomplice is not sufficient to establish cause to believe the defendant guilty of any crime. His commitment upon the basis of such testimony was a deprivation of the defendant's constitutional right to due process of law, and the information based upon such evidence, is without lawful foundation. The action of the Superior Court in setting aside the information was lawful and correct.

Finally, we respectfully urge upon the Court the following considerations:

(1) That the precise question presented by this appeal is of first impression;

(2) That the case of *In re Schwitalla,* supra, affords no reliable basis for the future conduct of the Courts, the bar and the public generally, it being, as respects the question here involved, mere dictum, the Court in that case having expressly held the testimony of the accomplice to have been corroborated;

(3) That the question here involved should be finally resolved on the basis of principle and reason, consonant with the requirements of due process of law and the orderly administration of justice;

(4) That the proper, and indeed, the only approach to the resolution of the question here involved, consonant with the fullest protection of the constitutional guarantees of the citizen and best calculated to secure to him his inalienable rights of life and liberty, is that contained in the decision in the case of *State v. Smith,* supra, forbidding the incarceration of the citizen upon suspicion and speculation.

Wherefore, for the reasons stated and the showing made, it is respectfully submitted that this petition for a writ of certiorari be granted.

Dated, Sacramento, California,
April 5, 1948.

DONALD EUGENE WACHHORST,
Counsel for Petitioner.

PETER MANNINO,
C. K. CURTRIGHT,
Of Counsel.

(Appendix Follows.)

EXHIBIT 1.

In the District Court of Appeal of the State of California in and for the Third Appellate District.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,
vs.
ROBERT V. McRAE,
Defendant and Respondent.

The defendant was charged, under section 288a of the Penal Code. After a preliminary examination by a magistrate he was held for trial in the Superior Court upon the uncorroborated testimony of the accomplice only. An information was filed, to which he first pleaded not guilty. By leave of court that plea was withdrawn and the defendant moved, under Section 995 of the Penal Code, to dismiss the information on the ground that he had been "committed without reasonable or probable cause." The motion was granted and the information was dismissed. From that order the State of California has appealed.

The chief issue on this appeal is whether the uncorroborated testimony of an accomplice furnishes

proof that the alleged offense was committed, or that the accused person is guilty thereof, warranting a magistrate in committing him for trial under the provisions of Section 872 of the Penal Code. The Attorney General contends that the provisions of Section 1111 of the Penal Code, with respect to the necessity of corroborating the evidence of an accomplice, is limited to trial by a petit jury and that it does not apply to preliminary examinations before a magistrate. He also asserts that Laurel Quigley, who was the only witness at the preliminary examination, was not an accomplice to the crime.

We are of the opinion the record of the preliminary hearing clearly shows that Quigley was an accomplice. (People v. Tanner, 67 Cal. App. 2d 360, 363; 8 Cal. Jr. 173, sec. 253.) He willingly participated in the offense. There is no evidence to the contrary.

We conclude that the provisions of Section 1111 of the Penal Code apply not only to a trial by a petit jury, but also to legal hearings of accusations before grand juries or magistrates. That section prescribes a limitation of the sufficiency of the testimony of an accomplice as proof of a crime or misdemeanor on account of the unreliable and discredited nature of the testimony of a *particeps criminis*. If affects the very character and sufficiency of the evidence to establish the guilt of an accused. The uncorroborated testimony of an accomplice does not constitute credible evidence of the commission of a crime, or of the defendant's participation therein. It will not support a

conviction because it is not worthy of belief. In People v. Dail, 22 Cal. (2d) 642, the Supreme Court said at page 655 in regard to such evidence, that:

> "The requirement of Section 1111 of the Penal Code that accomplice testimony must be corroborated is a convincing indication of the legislative intent and policy that such evidence is to be regarded as untrustworthy and not to be believed unless fortified by other evidence tending to connect a defendant with the commission of the offense charged. The power of the Legislature so to provide is not questioned and if it may thus stigmatize accomplice testimony and completely deny it credence unless corroborated, no valid reason exists why the legislature may not declare, as it has done in subdivision 4 of section 2061 (C.C.P.) that the jury is to be instructed to view such accomplice testimony with distrust. It merely serves to state the legislative condition upon which the jury is permitted to hear that class of evidence." (Italics added.)

If the uncorroborated testimony of an accomplice is not adequate evidence to support a conviction, it is not sufficient evidence, standing alone, upon which a magistrate or a grand jury may commit or indict an accused person. If it is not sufficient evidence because it is discredited, it certainly furnishes no adequate proof that a crime has been committed, or probable cause to believe that the defendant is guilty of the alleged offense. Both a grand jury and a magistrate are required to receive only legal evidence upon hearings of accusations of crime. To indict or commit an accused person without legal evidence would re-

sult in depriving the defendant of his liberty without due process of law contrary to the inhibition on the Fourteenth Amendment to the United States Constitution. Section 919 of the Penal Code provides that a grand jury shall "receive none but legal evidence, and the best evidence in degree, to the exclusion of heresay or secondary evidence." The same rule applies to a preliminary hearing. An indictment which is based upon no legal evidence deprives the defendant of his liberty without due process, and is void. (Greenberg v. Superior Court, 19 Cal. (2d) 319, 322). The commitment of an accused person by a magistrate based upon mere hearsay or incompetent evidence, is likewise unauthorized and void. (In re Martinez, 36 Cal. App. (2d) 687; In re Kawaguchi, 12 Cal. App. 498; 7 Cal. Jur. 982, sec. 120.) In the Kawaguchi case, supra, the court said:

> "The law does not contemplate that a party shall be put upon his trial for a felony under an information having for its sole support a commitment based entirely upon hearsay or incompetent evidence."

It is true that when hearsay evidence is received at a preliminary hearing without objection, its incompetency is thereby waived, and it may then be considered by the magistrate in determining the existence of probable cause. (In re Plummer, 79 ACA 774; In re Sielcken, 51 Cal. App. 538; 10 Cal. Jr. 1054, sec. 305; 20 Am. Jur. 401, sec. 452; 104 A.L.R. 1130, note.) But the last mentioned exception to the general rule with respect to hearsay evidence has no application to this case. While a committing magistrate is

not bound by the rule which is applicable to a trial jury, with respect to proof of guilt beyond a reasonable doubt (In re Souza, 65 Cal. App. 9), there must be substantial legal evidence of the crime and of the defendant's participation therein, to warrant the magistrate in committing the accused persons for trial under Section 872 of the Penal Code. (42 C.J.S. 871, Sec. 24c (3).)

In New York, under statutes authorizing indictments by grand juries, containing language similar to the California statutes in that regard, including our Section 1111 of the Penal Code, it has been repeatedly held that the indictments founded upon uncorroborated testimony only of accomplices are invalid and should be set aside. (People v. Dally, 21 N.Y. Supp. 2d 774; People v. Nicosia, 298 N.Y. Supp. 591; People v. Markan, 205 N.Y. Supp. 197.) In the Nicosia case, supra, defendant's motion to dismiss the indictment was granted, on the ground that the testimony of the two accomplices, upon which the indictment was founded, was not corroborated as required by Section 399 of the New York Code of Criminal Procedure. That section, similar to Section 1111 of the California code, reads as follows:

> "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

The court said in the Nicosia case, at page 599:

> "If the defendant Nicosia suborned Loffredo and Autoori as alleged in the indictment, they are

all particeps criminis, * * * and the testimony of the latter must therefore be corroborated by evidence which tends to connect Nicosia with the commission of the crime.

"In conclusion, as I have already indicated, sections 256 and 258, Code Cr. Proc. are protective measures intended to safeguard the right which every individual accused of crime has to the presumption of innocence guaranteed by our Constitution. It is as imperative therefore not to indict on evidence which at best can create but suspicion of guilt as it is to indict when competent legal evidence is adduced to warrant an indictment. The obligation is no more cogent in the latter case than it is in the former. * * *

"An indictment found in violation of these standards should be dismissed. Motion granted."

In the Markan case, supra, the indictment was also set aside for lack of corroboration of the accomplice. Commenting upon the application of Section 399 of the New York code to testimony before the grand jury, which section is similar to Section 1111 of the California Penal Code, the court said, at page 203 of its opinion:

"* * * The necessity for corroboration as provided by statute applies to an indictment as well as to a trial and the indictment can be set aside at any time when it appears that the evidence before the grand jury was insufficient on which to sustain it." (Italics added.)

In the Dally case, supra, the court said:

"* * * We hold that corroboration of an accomplice or accomplices is necessary to the finding of

a valid indictment by a grand jury, and that in the absence of corroboration the indictment may be set aside."

In the last mentioned case the New York court specifically disapproved of a contrary holding in the previous decision of that court in People v. Munro, 268 N.Y. Supp. 404, cited and chiefly relied upon by the appellant in this case. The Munro case was overruled in that regard, and furnishes no authority in support of appellant's contention that Section 1111 of the California code has no application to preliminary hearings before a magistrate.

The cases of In re Schwitalla, 36 Cal. App. 511 and Stern v. Superior Court, 78 A.C.A. 9, upon which the appellant relies, are not in conflict with what we have previously said regarding the necessity of corroborating the testimony of an accomplice, to render it available for consideration of a magistrate or a grand jury, to warrant a commitment or an indictment of the alleged crimes. Each of the last mentioned cases specifically holds that the record contains adequate evidence corroborating the accomplice. In the Schwitalla case the court said:

"* * * And we may add that, to our minds, the testimony of the independent witnesses who gave evidence * * * furnished some corroboration, slight though it was, of the testimony of the accomplice."

And in the Stern case the court said, at page 16 of the opinion that:

"* * * The transcript contains the evidence of witnesses who appeared before the grand jury

which sufficiently corroborates the testimony of the accomplices."

Since there was corroborating evidence adduced before the magistrate and the grand jury in the last mentioned cases, whatever may have been said regarding the necessity therefor is mere dictum.

In the present case there was absolutely no corroboration of the accomplice, who was the only witness called or examined at the preliminary hearing. No other evidence was adduced.

We conclude that the respondent was erroneously committed for trial by the magistrate upon the uncorroborated testimony of the accomplice and that the information was therefore properly dismissed.

Thompson, J.

We concur:
Adams, J.
Peek, J.

Filed June 18, 1947,
George N. Didion, Clerk.

EXHIBIT 2

In the Supreme Court of the
State of California
In Bank

Criminal No. 4823

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,
vs.
ROBERT V. McRAE,
Defendant and Respondent.

OPINION

Respondent was charged in an information with violating section 288a of the Penal Code. The only evidence at the preliminary hearing was the testimony of the complaining witness. The magistrate held respondent to answer. The People appeal from an order of the Superior Court granting respondent's motion under section 995 of the Penal Code to set aside the information on the ground that he was committed without reasonable or probable cause.

Respondent contends that the complaining witness was an accomplice and that his testimony, which was

uncorroborated, could not support a determination by the magistrate under section 872 of the Penal Code that there was sufficient cause to believe respondent guilty of the offense charged. Respondent relies on section 1111 of the Penal Code, which provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense * * *" Appellant contends that the complaining witness was not an accomplice and that even if he was, his uncorroborated testimony could support the commitment, since section 1111 prohibits only a conviction based solely upon the uncorroborated testimony of an accomplice.

According to his testimony the complaining witness submitted to the act committed upon him without resisting or objecting to respondent's conduct. He was 15 years of age, and there is nothing in his testimony to indicate that he lacked normal mentality. Since his testimony shows that he knew that the act was wrongful and that he willingly participated therein, it follows that he was an accomplice. (People v. Robbins, 171 Cal. 466, 472; People v. Tenner, 67 Cal. App. 2d 360, 363; People v. Reynolds, 26 Cal. App. 2d 219, 221; People v. Casey, 79 Cal. App. 295, 300; see People v. McCollum, 214 Cal. 601, 602.)

It was held in In Re Schwitalla, 36 Cal. App. 511, that a magistrate can hold a defendant to answer upon the uncorroborated testimony of an accomplice. "While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the tes-

timony of an accomplice is admissible, and is proper to be considered, and we think it sufficient to make it appear that there is a 'probability' that a defendant has been guilty of the offense charged against him." (36 Cal. App. 511, 512.) This case was followed by the Circuit of Appeals for the Ninth Circuit in Curreri v. Vice, 77 F. 2d 130. A Minnesota statute that also required corroboration of the testimony of an accomplice to support a conviction was similarly construed in State v. Jeffrey, 211 Minn. 55, 300 N. W. 7.

Respondent contends that the Schwitalla case was erroneous and should be disapproved, on the ground that it construed section 1111 according to its literal terms without regard to its underlying policy that testimony of an accomplice must be regarded with distrust. He contends that this policy governs the testimony of an accomplice at a preliminary hearing as well as at a trial and that a commitment, like a conviction, cannot be based on the uncorroborated testimony of an accomplice. Since the testimony of an accomplice comes from an untrustworthy source and may be given in expectation of immunity, it must be received by a jury with caution and distrust. (Code Civ. Proc. sec. 2061(4); People v. Dail, 22 Cal. 2d 642, 653, 654, and cases there cited.) A committing magistrate should likewise receive the testimony of an accomplice with caution and distrust. A committing magistrate may nevertheless believe the testimony of an accomplice and conclude that there is

probable cause to believe defendant guilty of a public offense to which he should be held to answer.

Section 1111 supplements the policy that testimony of an accomplice shall be regarded with distrust by barring a conviction of a defendant based solely upon the uncorroborated testimony of an accomplice, even though such testimony may convince the jury beyond a reasonable doubt. "The requirement of section 1111 of the Penal Code is in addition to the requirement of the doctrine of reasonable doubt; it in effect says that even though the jury are convinced to a moral certainty that the defendant is guilty, yet they must acquit him if the testimony of the accomplice is not corroborated by other evidence, which connects him or tends to connect him with the offense charged." (People v. Dillon, 68 Cal. App. 457, 477; see People v. Clough, 73 Cal. 348, 353; People v. Negra, 208 Cal. 64; 8 Cal. Jur. 173; 2 Wharton, Criminal Evidence, 11th ed. 1225.) Thus by prohibiting a conviction based solely upon the uncorroborated testimony of an accomplice, section 1111 precludes a result that might otherwise follow from such testimony. It is explicit and complete in defining the result that it precludes. In restricting its prohibition to a conviction, section 1111 is in harmony with the principle that less evidence is required to support a determination of probable cause for a commitment than a determination of guilt for a conviction. It is settled that in determining that there is probable cause to hold a defendant, a magistrate is not bound by the rule that there must be no reasonable doubt as to the guilt of a defendant,

and that he may commit a defendant, even though there may be doubt as to his guilt. (People v. Nagle, 25 Cal. 2d 216, 222; People v. Tallman, 27 Cal. 2d 209, 212; People v. Mitchell, 27 Cal. 2d 678, 681.)

The order appealed from is reversed.

Traynor, J.

We concur:

Gibson, C. J.

Shenk, J.

Edmonds, J.

Spence, J.

DISSENTING OPINION OF SCHAUER, J.

I dissent. As held in the majority opinion the complaining witness is an accomplice; also as stated in the majority opinion the only evidence received at the preliminary hearing was the testimony of the accomplice. Such testimony, uncorroborated, was wholly incompetent for the proof of any fact (Penal Code, §1111; 22 C. J. S. 1418, §813b; *State v. Smith* (1903), 138 Ala. 111, 35 So. 42, 100 Am. St. Rep. 26); standing uncorroborated the status of the case as to proof of guilt, probable cause, or any other fact is exactly the same as though no evidence whatsoever had been adduced.

The majority opinion errs, therefore, in applying the preliminary hearing rule as to quantum or persuasiveness of proof to a situation where there is *no* proof. I have no quarrel with the rule itself, which is that in a preliminary examination proceeding it is not necessary that a defendant be proved guilty beyond a reasonable doubt; that it is sufficient to warrant binding him over for trial if upon the proof it is reasonable to believe that the defendant is guilty of the offense charged *(People v. Mitchell* (1946), 27 Cal. 2d 678, 681, and cases there cited). Under this rule, even though the committing magistrate may view the testimony of an accomplice with caution, suspicion and doubt, he may legally, if the acccomplice's testimony is corroborated, hold the defendant to answer. But if the testimony of the accomplice is left wholly uncorroborated and there is no other evidence of guilt then there is no competent evidence

at all upon which the order of commitment can be based.

The majority opinion cites and relies upon *In re Schwitalla* (1918), 36 Cal. App. 511, 512, wherein it is said that "While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is admissible, and is proper to be considered, and we think is sufficient to make it appear that there is a 'probability' that a defendant has been guilty of the offense charged against him." In my estimation the quoted statement is wholly erroneous and should be disapproved. Both the Schwitalla opinion and the majority opinion here err in failing to recognize that in dealing with accomplices' testimonies courts may be confronted with either of two materially different situations. One of those situations involves testimony which is competent and admissible but the weight of which is impaired; the other situation relates to testimony as to the weight of which there can be no question because it is wholly incompetent and cannot be considered at all.

Thus, as to the first type of situation, where a witness is shown to be an accomplice but his testimony is corroborated, his testimony is competent and admissible but the weight of it is impaired by the fact that he is an accomplice. The fact that he is an accomplice in itself impeaches him as a witness but when corroborated his testimony becomes competent and may be given whatever relative weight the trier of fact determines. But as to the second class of situa-

tion, where an admitted accomplice is permitted to testify and his testimony is left wholly uncorroborated, there can be no question as to the *weight* to be accorded his testimony; it is entitled to no weight whatsoever; it should be stricken from the record; it is wholly incompetent for the proof of any fact in a criminal case. "Where the statutes forbid a conviction on the uncorroborated testimony of an accomplice, it is held to be the duty of the court to direct an acquittal where there is no corroboration within the requirements of the statute, and even though corroboration is not required by statute, it is held to be within the discretion of the trial court to direct an acquittal where the evidence consists solely of the uncorroborated testimony of an accomplice." (22 C. J. S. 1418, §813b.)

There is no satisfactory basis for holding that evidence which, in the accumulated wisdom of the law, is wholly incompetent to prove any fact in the Superior Court, or to be considered at all therein, shall be received and accepted as the sole and complete proof of every essential fact in the committing court. Again, I emphasize, we have here no question as to quantum or degree of proof; we have a total absence of any proof. The exact point now before us was before the Supreme Court of Alabama in *State v. Smith* (1903), *supra,* 138 Ala. 111, 35 So. 42, 100 Am. St. Rep. 26; the statute of Alabama is substantially the same as ours. That court said, "The above conclusion leaves but one question in the case. That is whether the uncorroborated testimony of an

accomplice may be sufficient to show probable cause to believe that a felony has been committed, and that the party under inquiry is guilty thereof. * * * It is to be noted that this statute in terms operates only to prevent convictions of felony on the testimony of an accomplice. It does not in terms apply to preliminary examinations, nor to trials on habeas corpus, nor to the exclusion of a finding of probable cause for believing that an offense has been committed, and that the accused is guilty thereof, on such examination or trial. Yet, in our opinion its effect is to stamp a policy upon the administration of the law in this connection which cannot be carried out unless it be given operation upon cases where the inquiry is probable cause vel non, as well as where the inquiry is as to absolute guilt. The statute infects the testimony of accomplices with such absolute infirmity as that not only may the citizen be not convicted upon it, but as also that he should not be deprived of his liberty in anticipation of a final trial upon it. A consideration of practicabilities in the administration of the criminal law, so to speak, would seem to enforce the same conclusion. Why should the citizen be held to the grand jury, or indicted by the grand jury on testimony upon which no petit jury could possibly convict him? What good end could be served by such a proceeding? Can there be said to be even probable cause shown in any case by testimony which the law expressly and positively declares to be insufficient to support a conviction? We think not. * * * To hold him would be a vain and useless thing, involving his

incarceration not as a punishment for crime and not really to the end that he should be tried for a crime charged of his probable guilt of which there is evidence to prove, but at the best upon a mere speculation that evidence may be found to corroborate that of the accomplice. The evidence before the probate judge in this case tending to show the guilt of the petitioner was that of the accomplice alone and uncorroborated. The judge correctly discharged the petitioner, and his order to that effect is affirmed." (See also *In re Mitchell* (1905), 1 Cal. App. 396, 401; *Ex parte Oxley* (1915), 38 Nev. 379, 149 Pac. 992, 994.)

As in *State v. Smith, supra,* the order of the trial court should be affirmed.

Schauer, J.

I concur:
Carter, J.

Filed December 17, 1947,
William I. Sullivan, Clerk.